COUTINHO CARO & CO. U.S.A., INC., Petitioner, v. MARCUS TRADING, INC., Respondent. MARCUS TRADING, INC., Petitioner, v. COUTINHO CARO & CO. U.S.A., INC., Respondent. HUNAN PROVINCE METALS & MINERALS IMPORT & EXPORT CORP., Petitioner, v. COUTINHO CARO & CO. U.S.A., INC., Respondent.

Civil Action No. 3:95cv2362 (AWT) MASTER CONSOLIDATED CASE; Civil Action No. 3:96cv2218 (AWT) MEMBER CASE; Civil Action No. 3:96cv2219 (AWT) MEMBER CASE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2000 U.S. Dist. LEXIS 8498

March 14, 2000, Decided
March 14, 2000, Filed

DISPOSITION: [*1] Court has no subject matter jurisdiction to hear Coutinho's petition to vacate. Marcus' motion to dismiss Coutinho's petition granted. Each of Coutinho's objections to recognition and enforcement of award lacks merit. Petitions to confirm Commission's award, brought by Marcus and Hunan, granted.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner corporation petitioned to vacate an arbitration award by the China International Economic and Trade Arbitration Commission in favor of respondent corporations, finding petitioner liable for breach of contract. Respondent corporations petitioned for confirmation of arbitration award.

OVERVIEW: Petitioner entered into negotiations with respondent corporations to sell steel billets to each respondent. Petitioner refused to perform under substantially identical agreements it entered into with respondents, claiming in each case that the other party had failed to satisfy an express condition precedent. Respondents sought arbitration before the China International Economic and Trade Arbitration Commission (the Commission). The Commission handed down an award in favor of respondents, finding petitioner liable for breach of contract. Petitioner filed a petition to vacate the arbitration award. Respondents filed petitions for confirmation of the award. The court denied petitioner's request and granted respondents' petition. The court held, inter alia, that under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201 app., the court lacked subject matter jurisdiction over petitioner's request to vacate the arbitration award rendered by the Commission.

OUTCOME: The court granted respondents' motion to confirm arbitration award. The court lacked subject matter jurisdiction over petitioner's motion to vacate the arbitration award. Only the courts of China had jurisdiction to vacate the arbitration award entered against petitioner.

CORE TERMS: arbitral, arbitration, petition to vacate, motion to dismiss, letter of credit, competent authority, arbitration clause, public policy, judicata, collateral estoppel, condition precedent, confirm, arbitrator, severable, sentence, arbitration award, arbitration agreement, subject matter jurisdiction, contract existed, endorsement, domestic, bear, confirmation, lack of personal jurisdiction, principal place of business, territory, suspended, marginal, pertain, billets

CORE CONCEPTS -

International Law: Sources of International Law
International Trade Law: Authority to Regulate
As an international treaty duly ratified by the United States, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201 app., is the supreme law of the land, U.S. Const. art. VI, cl. 2, and controls any case in any American court falling within its sphere of application. The scope of the Convention's application is set forth in its first article: This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

International Law: Sources of International Law
International Trade Law: Authority to Regulate
The second sentence of Article I(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201 app., as supplemented by 9 U.S.C.S. @ 202, applies to those arbitral awards made in the United States which arise from a commercial relationship with some significant foreign nexus.

International Law: Sources of International Law
Section 2 of Article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201 app., contains a definition of the term "arbitral awards," and @ 3 provides for the right of a country that is acceding to the Convention to limit the scope of its application in that country in two specified ways: When signing, ratifying or acceding to the Convention, or notifying extension under article X thereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

International Law: Sources of International Law
International Trade Law: Authority to Regulate
In the United States, application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330

U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201 app. is governed by a statutory provision, 9 U.S.C.S. @ 202, found in the implementing legislation, which reflects this country's decision to limit application of the Convention to commercial relationships and defines nondomestic awards.

International Law: Sources of International Law
International Trade Law: Authority to Regulate
International Trade Law: Dispute Resolution
See 9 U.S.C.S. @ 202.

International Law: Sources of International Law
International Law: Treaty Interpretation
The United States, in ratifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201 app., also entered a reservation (consistent with Article I(3) of the Convention) that it will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another contracting state. 9 U.S.C.S. @ 201 app.

International Law: Treaty Interpretation
International Trade Law: Authority to Regulate
International Trade Law: Dispute Resolution
The focus of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201 app. is the recognition and enforcement of foreign arbitral awards. Two provisions of the Convention make reference to the possibility that the party against whom an award is sought to be enforced may seek to have that award set aside or suspended. Article V pertains to the circumstances under which recognition and enforcement of an award may be refused. Section (1)(e) of that article provides that recognition and enforcement can be refused, inter alia, if the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Convention, art. V(1)(e).

International Trade Law: Dispute Resolution
Article VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201, provides that if an application for the setting aside or suspension of an award has been made to a competent authority referred to in art. V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

International Trade Law: Dispute Resolution
The "competent authority" as mentioned in art. V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201, for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. The phrase "or under the law of which" the award was made refers to the theoretical case that on the basis of an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made. It is clear that any suggestion that a court has jurisdiction to set aside a foreign award based

upon the use of its domestic, substantive law in the foreign arbitration defies the logic both of the Convention debates and of the final text, and ignores the nature of the international arbitral system.

International Trade Law: Dispute Resolution
Pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201, an application for setting aside or suspending an arbitral award may be made only to a competent authority of the country in which, or under the law of which, that award was made. The language in the Convention -- "competent authority of the country in which, or under the law of which, that award was made," Convention, art. V(1)(e) -- refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted.

International Trade Law: Dispute Resolution
Pursuant to Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201, this court may hear objections raised in opposition to a petition to confirm an award, whether that award was made in the United States or elsewhere.

International Trade Law: Dispute Resolution
Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201, a district court's role in reviewing a foreign arbitral award is strictly limited. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention. 9 U.S.C.S. @ 207.

International Law: Dispute Resolution: Arbitration & Mediation
Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201 sets forth the following grounds for refusing to recognize or enforce arbitral award: The parties to the agreement referred to in article II were under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties.

International Trade Law: Dispute Resolution
Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 201 sets forth the following ground for refusing to recognize or enforce an arbitral award: The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

International Trade Law: Dispute Resolution

Enforcement may be refused (a) if the subject matter of the difference is not capable of settlement by arbitration, or (b) if recognition or enforcement of the award would be contrary to the public policy of the country in which enforcement or recognition is sought. Art. V(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 20.

International Trade Law: Dispute Resolution
Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 20 app., provides that each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which may arise between them concerning a subject matter capable of settlement by arbitration. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

International Trade Law: Dispute Resolution
The seven grounds for refusing to confirm an arbitral award are the only grounds explicitly provided under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 20 app., once the Convention is found to be applicable to an arbitral award. When an action is brought to enforce an award rendered outside the United States, a court in this country may refuse to enforce the award on [redacted] seven grounds only.

Civil Procedure: Preclusion & Effect of Judgments: Res Judicata
As a general rule, the doctrine of res judicata, or claim preclusion, provides that when a court of competent jurisdiction has entered final judgment on merits of a cause of action, the parties to that action and their privies are thereby bound not only as to every matter presented to the court but also as to every matter that might have been brought before the court.

Civil Procedure: Preclusion & Effect of Judgments: Collateral Estoppel
Under the doctrine of collateral estoppel, or "issue preclusion," where a second suit is upon a different cause of action, the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. For collateral estoppel to apply, four elements must be present: (1) the issues of both proceedings must be identical, (2) the relevant issues were actually litigated and decided in the prior proceeding, (3) there must have been full and fair opportunity for the litigation of the issues in the prior proceeding, and (4) the issues were necessary to support a valid and final judgment on the merits.

Civil Procedure: Preclusion & Effect of Judgments: Collateral Estoppel
Constitutional Law: Procedural Due Process: Scope of Protection
It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be [redacted]d.

Civil Procedure: Preclusion & Effect of Judgments: Collateral Estoppel
Constitutional Law: Procedural Due Process: Scope of Protection
The doctrine of collateral estoppel applies only to judgments on the merits, and a dismissal for lack of personal jurisdiction is not a judgment on the merits.

Civil Procedure: Dismissal of Actions
Civil Procedure: Preclusion & Effect of Judgments: Collateral Estoppel
Fed. R. Civ. P. 41(b) provides that unless the court in its order for dismissal otherwise specifies, a dismissal under that subdivision and any dismissal not provided for in that rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

International Law: Dispute Resolution: Arbitration & Mediation
Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards , 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 20 app., provides that the term agreement in writing shall include an arbitral clause in a contract signed by the parties.

International Law: Dispute Resolution: Arbitration & Mediation
International Law: Dispute Resolution: Comity Doctrine
The language of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards , 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 20, should be interpreted broadly to effectuate its recognition and enforcement purposes.

International Law: Dispute Resolution: Arbitration & Mediation
An agreement in writing shall include and thus is not limited to an arbitral clause in a contract, and Section 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 20 app., provides that the relationships between the parties can be contractual or not. Convention, art. II(1).

International Law: Dispute Resolution: Arbitration & Mediation
International Law: Dispute Resolution: Comity Doctrine
The public policy defense under Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 20 app., is an extremely narrow one, which pertains only when enforcement would violate the forum state's most basic notions of morality and justice. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. Additionally, considerations of reciprocity -- considerations given express recognition in the Convention itself -- counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

International Law: Dispute Resolution: Arbitration & Mediation
International Law: Dispute Resolution: Comity Doctrine
Erroneous legal reasoning or misapplication of established legal principles by an arbitral panel should generally not be held to violate public policy within the meaning of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.S. @ 20 app. All laws, be they procedural or substantive, are founded on strong policy considerations. Yet not all laws represent this country's most basic notions of morality and justice. Were it otherwise, the Convention's public policy exception would eviscerate the very goal of the Convention as a whole -- to encourage the recognition and enforcement of commercial

arbitration agreements.

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JUDGES: Alvin W. Thompson, United States District Judge.

OPINIONBY: Alvin W. Thompson

OPINION: RULING ON MOTION TO DISMISS PETITION TO VACATE, AND ON PETITIONS TO CONFIRM, ARBITRATION AWARD

In early 1993, Coutinho Caro & Co. U.S.A., Inc. ("Coutinho") entered into negotiations with each of Marcus Trading, Inc. ("Marcus") and Hunan Province Metals & Minerals Import & Export Corp. ("Hunan") for Coutinho to sell steel billets to each of Marcus and Hunan. Coutinho refused to perform under substantially identical agreements it entered into with Marcus and Hunan, respectively, claiming in each case that the other party had failed to satisfy an express condition precedent. Marcus and Hunan[*2] sought arbitration before the China International Economic and Trade Arbitration Commission ("the Commission") in Beijing. On August 5, 1995, the Commission handed down an award favor of Marcus and Hunan, finding Coutinho liable for breach of contract.

This matter is presently before the court on a petition to vacate the Commission's award in favor of Marcus, n1 brought by Coutinho (Docket Number 3:95cv2362), and petitions to confirm the Commission's award, brought by Marcus (Docket Number 3:96cv2218) and Hunan (Docket Number 3:96cv2219). Marcus has moved to dismiss Coutinho's petition to vacate, and Coutinho has asserted several defenses in opposition to Marcus and Hunan's petitions to confirm.

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n1 Coutinho's petition to vacate addresses only that portion of the Commission's award that pertains to Marcus.

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For the reasons that follow, the court concludes that it does not have subject matter jurisdiction to hear Coutinho's petition to vacate. Accordingly, Marcus' motion to dismiss Coutinho's petition is[*3] being granted. The court finds further that each of Coutinho's objections to recognition and enforcement of the award lacks merit. Accordingly, the petitions to confirm the Commission's award, brought by Marcus and Hunan, are being granted.

I. FACTUAL BACKGROUND

Coutinho Caro & Co. U.S.A., Inc., is a Delaware corporation with its principal place of business in Stamford, Connecticut. Marcus Trading, Inc., is a California corporation with its principal place of business in Wilmington, California. Hunan Province Metals & Minerals Import & Export Corp. is a

corporation organized under the laws of the People's Republic of China with its principal place of business in China.

On or about February 13, 1993, Coutinho entered into contract negotiations with Marcus and with Hunan. Coutinho entered into a "Contract" with Marcus, executed by both parties, pursuant to which it agreed to sell to Marcus, and Marcus agreed to purchase from Coutinho, 10,000 metric tons of steel billets, which were to be shipped from Finland to China. Coutinho entered into a substantially identical contract with Hunan. (Answer to Pet. (doc. # 9, Docket Number 3:96cv2218) at Ex. C (contract between Coutinho[*4] and Marcus); Answer to Pet. (doc. # 9, Docket Number 3:96cv2219) at Ex. C (contract between Coutinho and Hunan).) Each of the contracts included the following condition precedents which was set forth below Coutinho's signature:

Subject to Buyers Letter of Credit being amended as requested. Letter of Credit conditions prevail over present Contract conditions.

(Id.) Each contract also contained an arbitration clause, which provided that "all disputes in connection with this Contract or the execution thereof shall be settled by friendly negotiation," but failing that, arbitration would be held before the Commission, in accordance with the Commission's rules of procedure. (Id.)

On or about March 30, 1993, prior to the shipment of any steel billets, Coutinho notified each of Marcus and Hunan that it was refusing to perform and was declaring the contracts null and void because each of Marcus and

Hunan had: (1) failed to provide timely notice of a required amendment to the letters of credit, and (2) failed to properly amend the letters of credit. Each of Marcus and Hunan thereafter demanded arbitration before the Commission in Beijing, in or about June 1994. The[*5] two matters were heard by the same panel of arbitrators, which issued a single arbitral award.

Coutinho objected to proceeding with the arbitration, arguing in each case that the condition precedent of providing an acceptable letter of credit had not been satisfied and that, accordingly, no contract between the parties conferring jurisdiction upon the Commission had ever come into existence. Each of Marcus and Hunan responded that its letter of credit had been properly and timely amended and that Coutinho's failure to perform therefore constituted a breach of contract.

At a preliminary hearing, the panel of three arbitrators decided that, notwithstanding the parties' disagreement over whether there existed valid contracts between them, the Commission had jurisdiction and authority to hear the disputes. This was based on a finding that the arbitration clause was severable from the remainder of the contract:

The arbitration article should be binding on both parties as long as the parties have signed the contract. The arbitration article is an effective article and the arbitration commission has the jurisdiction in this case.

(Aff. of Stephen Conover (doc. # 8, Docket[*6] Number 3:96cv2218) at Ex. B, p. 4 (Arbitral Award of Aug. 5, 1995) [hereinafter "Arbitral Award"].) n2 The arbitrators ordered that Coutinho's disputes with Marcus and Hunan be consolidated into one arbitration in Beijing.

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n2 In the Commission's view, "the effectiveness and existence of the contract shall not affect the arbitration article." (Arbitral Award at 4.)

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On August 5, 1995, the Commission unanimously found that Each of Marcus and Hunan had satisfied the condition precedent in its contract and that Coutinho was liable in each instance for breach of contract as a result of its nonperformance. (Arbitral Award at 10.) The arbitrators awarded Marcus the sum of $ 135,216.97 plus interest at 10% per year from September 20, 1995, and awarded Hunan the sum of $ 300,000 plus interest at 10% per year from September 20, 1995. (Id. at 12-13.)

Prior to the arbitration award being issued in Beijing. Coutinho filed suit against Marcus in this district. See Coutinho Caro & Co. v. Marcus Trading, Inc., No. [*7] 3:94cv1325 (JBA). The complaint in that case, filed on August 9, 1994, alleged that Marcus breached its agreement with Coutinho by failing to obtain an acceptable letter of credit. Coutinho sought damages that included lost profits, costs and expenses. On March 31, 1995, Marcus filed a motion to dismiss for lack of personal jurisdiction and a motion to stay the case pending arbitration. On July 30, 1996, the court granted Marcus' motion to dismiss in an eight-page ruling. On the same date, the court also issued a marginal endorsement order denying the motion for a stay in light of the court's finding in its ruling on the motion to dismiss that no contract existed between the parties. This statement in the marginal endorsement order is the basis for one of Coutinho's objections to enforcement of the arbitration award at issue here. Coutinho argues that under the doctrines of res judicata and collateral estoppel, it has been established for the purposes of the actions presently before the court that no contracts existed between the parties.

II. MOTION TO DISMISS PETITION TO VACATE ARBITRATION AWARD

Coutinho has filed a petition with this court to vacate the Commission's [*8]award on the grounds that: (1) the award was rendered in manifest disregard of the applicable law of contracts; and (2) the arbitration panel exceeded its authority in rendering a decision on the validity and existence of the subject contract. Marcus has moved to dismiss that petition for lack of subject matter jurisdiction.

The issue before the court on Marcus' motion to dismiss is whether, as Marcus asserts, the court is deprived of jurisdiction pursuant to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C.A. @ 201 app. at 5 14 (West 1999) [hereinafter "Convention"], to hear this petition to vacate. Coutinho contends that the Convention is inapplicable to the award at issue and that the Federal Arbitration Act, 9 U.S.C. @@ 1-16 (1994), empowers the court to entertain its petition.

The court concludes that the award at issue is governed by the Convention and that, in accordance with the provisions of the Convention, Coutinho's petition

must be dismissed for lack of subject matter jurisdiction.

A. Governing Law [*9]

The Convention entered into force in the United States on December 29, 1970, and is explicitly incorporated into United States law through implementing legislation found at 9 U.S.C. @@ 201-208. The Convention's goal was "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts." Scherk v. Alberto Culver Co., 417 U.S. 506, 520 n.15, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974). It aimed "to limit the broad attacks on foreign arbitral awards that had been authorized by the predecessor Geneva Convention of 1927." International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172, 176 (S.D.N.Y. 1990) (citing Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 973 (2d Cir. 1974)). Accordingly, the language of the Convention "should be interpreted broadly to effectuate its recognition and enforcement purposes." Bergesen v. Joseph Muller Corp., 710 F.2d 928, 933 (2d Cir. 1983); cf. Parsons & Whittemore Overseas Co., 508 F.2d at 974 (noting that[*10] defenses to enforcement of foreign awards under the Convention are narrowly construed).

As an international treaty duly ratified by the United States, the Convention "is the supreme law of the land, U.S. Const. art. VI cl. 2, and controls any case in any American court falling within its sphere of application." Filanto, S.p.A., v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1236, (S.D.N.Y. 1992) (emphasis added), appeal dismissed by 984 F.2d 58 (2d Cir. 1993). The scope of the Convention's application is set forth in its first article:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . . It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Convention, art. I(1). "The territorial concept expressed in the first sentence of Article I(1) presents little difficulty." Bergesen, 710 F.2d at 932. It establishes, simply and categorically, that "the Convention applies to all arbitral awards[*11] rendered in a country other than the state of enforcement, whether or not such awards may be regarded as domestic in that state." Id. at 931; see also Jones v. Sea Tow Serv. Freeport New York, Inc., 30 F.3d 360, 364 (2d Cir. 1994) ("Where . . . an agreement to arbitrate involves the recognition and enforcement of arbitral awards made in the territory of a nation other than the nation where recognition and enforcement are sought, the Convention applies.").

The second sentence of Article I(1) of the Convention, which relates to "arbitral awards not considered as domestic awards," has provided a complex interpretive challenge to the courts in this country. See, e.g., Lander Co. v. M[redacted] Investments, Inc., 107 F.3d 476 (7th Cir. 1997), cert. denied, 522 U.S. 811, 139 L. Ed. 2d 19, 118 S. Ct. 55 (1997); Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983); In re Arbitration Between Trans Chemical Ltd. and China Nat'l Mach. Import and Export Corp., 978 F. Supp. 266 (S.D. Tex. 1997). In Bergesen, the court noted that the Convention itself did not define "nondomestic" awards. 710 F.2d at 932.[*12] However, "inasmuch as it was apparently left to each state to define which awards were to be considered as

nondomestic, Congress spelled out its definition of the concept in section 202" of the implementing legislation. Id. at 933 (citation omitted). Accordingly, the court in Bergesen held that the second sentence of Article I(1), as supplemented by 9 U.S.C. @ 202, applies to those arbitral awards made in the United States which arise from a commercial relationship with some significant foreign nexus. See Bergesen, 710 F.2d at 932; see also Lander, 107 F.3d at 482.

Section 2 of Article I contains a definition of the term "arbitral awards," and Section 3 provides for the right of a country that is acceding to the Convention to limit the scope of its application in that country in two specified ways:

When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare[*13] that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Convention, art I.(3).

Application of the Convention in the United States is governed by a statutory provision found in the implementing legislation, which reflects this country's decision to limit application of the Convention to commercial relationships and defines nondomestic awards:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is[*14] incorporated or has its principal place of business in the United States.

9 U.S.C. @ 202 (1994).

Finally, the United States, in ratifying the Convention, also entered a reservation (consistent with Article I(3) of the Convention) that it "will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State." 9 U.S.C.A. @ 201 app. at 526 n.29 (West 1999). This reservation presents no problem in the present case, as China (the situs of the award at issue) is a party to the Convention. See id. at 518.

Here, the arbitral award in favor of Marcus was made in China, and its enforcement is sought in the United States. In addition, it is undisputed that the relationship between the parties is considered as commercial. Therefore, the Convention, pursuant to the first sentence of Article I(1), provides the framework for analysis of the issues relating to the petition to vacate. n3 It is the situs of the award at issue here that compels this conclusion, not various factors emphasized by the parties which pertain to (1) whether the

[*15]award is covered by the Convention pursuant to the second sentence of Article I(1); (2) recognition and enforcement of a foreign award; or (3) a request to refer a dispute to arbitration pursuant to the Convention. n4

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n3 By the same token, the domestic portions of the Federal Arbitration Act, relied upon by Coutinho in its petition to vacate, do not control to the extent that they are in conflict with the Convention. See 9 U.S.C. § 208 (1994).

n4 The multi-factored test articulated in the cases cited by Coutinho, see Jones v. Sea Tow Serv. Freeport New York, Inc., 828 F. Supp. 1002, 1015 (E.D.N.Y. 1993), rev'd on other grounds, 30 F.3d 360 (2d Cir. 1994); Filanto, 789 F. Supp. at 1236, was developed to assist a court "presented with a request to refer a dispute to arbitration" pursuant to the Convention. Ledee v. Ceramiche Ragno, 684 F.2d 184, 186 (1st Cir. 1982) (emphasis added). As such, it is not applicable to a case, such as this, which concerns the confirmation or setting aside of an award previously rendered in a foreign country.

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[*16]

B. Jurisdiction over a Petition to Vacate an Arbitral Award

Having concluded that the Convention is the governing law in the present case, the court now turns to the question of what the relevant provision of the Convention requires. In short, the Convention contemplates that any petition to vacate an arbitration award will be filed in the country where the award was rendered.

The focus of the Convention is, obviously, the recognition and enforcement of foreign arbitral awards. Two provisions of the Convention make reference to the possibility that the party against whom an award is sought to be enforced may seek to have that award set aside or suspended. Article V pertains to the circumstances under which recognition and enforcement of an award may be refused. Section (1)(e) of that article provides that recognition and enforcement can be refused, inter alia, if the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Convention, art. V(1)(e). Article VI provides as follows:

If an application for the setting aside or suspension of the award has been made to a competent [*17] authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Convention, art. VI (emphasis added).

Thus, both of the provisions of the Convention that acknowledge the possibility that the party against whom an award is invoked may seek to have

it set aside or suspended make reference only to such an action being taken by a competent authority of the country in which the award was made or by a competent authority of the country under the law of which the award was made.

In International Standard Electric Corp., the court quoted Professor Van den Berg, and also referred to the discussions at the conference at which the Convention was adopted, as to the meaning of the reference in Article V(1)(e) to the "competent authority":

The "competent authority" as mentioned in Article V(1)(e) for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. [*18] The phrase "or under the law of which" the award was made refers to the theoretical case that on the basis of an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made. A. Van den Berg, the New York Arbitration Convention of 1958 350 (Kluwer 1981) (emphasis added). The view is consistent with a commentary on the circumstances under which the Soviet delegate offered the amendment embracing the language in issue. See United Nations Conference on International Commercial Arbitration, Summary Record of the 23rd Meeting, 9 June 1958, E/CONF. 26/SR.23 at 12 (12 Sept. 1958), reprinted in G. Gaja, International Commercial Arbitration: New York Convention III C.213 (Oceana Pub. 1978).

[redacted] F. Supp. at 177.

The court concluded that

it is clear . . . that any suggestion that a court has jurisdiction to set aside a foreign award based upon the use of its domestic, substantive law in the foreign arbitration defies the logic both of the Convention debates and of the final text, and ignores the nature of the international arbitral system.

Id.

This[*19] court finds the analysis in International Standard Electric Corp. persuasive, as did the court in M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844 (6th Cir. 1996). There, the court also concluded that "pursuant to the Convention, an application for setting aside or suspending an arbitral award may be made only to a 'competent authority of the country in which, or under the law of which, that award was made.' New York Convention, Art. VI (referencing Art. V(1)(e))." M & C Corp., 87 F.3d at 847-48. Thus, only the courts of China have jurisdiction to vacate the arbitration award entered against Coutinho in favor of Marcus. n5

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[redacted]n5 The court also notes that the language in the Convention -- "competent authority of the country in which, or under the law of which, that award was made," Convention, art. V(1)(e) -- "refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted." International Standard Elec. Corp., 745 F. Supp. at 178. Here, the arbitration was conducted in Beijing, pursuant to procedural rules of the China International Economic and Trade Arbitration Commission.

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[*20]

Accordingly, the court finds that it lacks subject matter jurisdiction over Coutinho's petition to vacate the arbitration award, and Marcus' motion to dismiss the petition is being granted.

III. PETITIONS TO CONFIRM ARBITRATION AWARD

The conclusion that Coutinho may not seek to vacate in this court the arbitral award at issue does not resolve the question whether that award should be enforced by this court. Pursuant to Article V of the Convention, this court may hear objections raised in opposition to a petition to confirm an award, whether that award was made in the United States or elsewhere. See M & C Corp., 87 F.3d at 848.

Marcus and Hunan filed separate actions petitioning the court to confirm the award rendered by the Commission in Beijing. These actions have been consolidated. Coutinho has raised three defenses to enforcement in each case.

Under the Convention, a "district court's role in reviewing a foreign arbitral award is strictly limited." Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997), cert. denied, 522 U.S. 1111, 118 S. Ct. 1042, 140 L. Ed. 2d 107 (1998). "The court[*21] shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention." 9 U.S.C. @ 207 (1999). Article V of the Convention sets forth the following grounds for refusing to recognize or enforce an arbitral award:

(a) The parties to the agreement referred to in article II [*] were . . . under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . .; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . .; or

(e) The award has not[*22] yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Convention, art. V(1) (footnote added). Enforcement may also be refused (a) if "the subject matter of the difference is not capable of settlement by arbitration," or (b) if "recognition or enforcement of the award would be contrary to the public policy of the country" in which enforcement or recognition is sought. Id. at art. V(2).

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n6 Article II provides, in pertinent part, as follows:

(1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences . . . which may arise between them . . . concerning a subject matter capable of settlement by arbitration.

(2) The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

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[*23]

These seven grounds for refusing to confirm an arbitral award "are the only grounds explicitly provided under the Convention" once the Convention is found to be applicable to an arbitral award. Yusuf Ahmed Alghanim & Sons, 126 F.3d at 19. It is "clear" that when an action is brought to enforce an award rendered outside the United States, a court in this country may refuse to enforce the award on these grounds only. Id. at 23; see also Parsons & Whittemore Overseas Co., 508 F.2d at 977 ("Both the legislative history of Article V. and the statute enacted to implement the United States' accession to the Convention are strong authority for treating as exclusive the bases set forth in the Convention.") (internal citation and footnote omitted); National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 813 (D. Del. 1990) (noting that the court "must recognize" an arbitral award "unless [the respondent] can successfully assert one of the seven defenses enumerated in Article V of the Convention").

In the consolidated actions brought by Marcus and Hunan to confirm the arbitral award rendered in their favor, Coutinho raises [*24] three objections to enforcement. Coutinho claims that (1) the doctrines of res judicata and collateral estoppel operate to bar Marcus and Hunan from asserting that there was a contract between the parties and, thus, preclude them from bringing a claim for enforcement of the award at issue; n7 (2) enforcement is precluded, pursuant to Article II of the Convention, as the parties never made a written agreement to arbitrate the dispute between them; and (3) enforcement is precluded, pursuant to Article V(2)(b) of the Convention, as recognition and enforcement would be contrary to the public policy of the United States.

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n7 Coutinho also argues in each case, in connection with this argument, that no binding contract was ever entered into with the buyer, and that, consequently, the arbitration panel lacked jurisdiction. The court's analysis as to why this argument advanced by Coutinho is unavailing is set forth in Part III.B., infra.

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A. Res Judicata and Collateral Estoppel

Coutinho first argues[*25] that enforcement of the arbitral award at issue is barred by the doctrines of res judicata and collateral estoppel, which preclude relitigation of claims and issues that were previously decided in a related matter. In addressing this argument, the court assumes arguendo that, but need not reach the issue of whether, those doctrines can properly be raised in this context as a bar to recognition and enforcement of an award under the Convention. n8 This objection is based on the action filed by Coutinho against Marcus in this district on August 9, 1994, Coutinho Caro & Co. v. Marcus Trading, Inc., No. 3:94cv1325 (JBA), to recover losses it sustained by reason of Marcus' alleged failure to provide an acceptable letter of credit. The suit was dismissed for lack of in personam jurisdiction over Marcus. In dismissing the action, the court cited Coutinho's "concession that no contract was formed" as a reason for rejecting Coutinho's argument that personal jurisdiction existed by virtue of the fact that the contract was made in Connecticut. (Ruling on Def.'s Mot. to Dismiss (doc. # 22, Docket number 3:94cv1325) at 6.) n9

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n8 A defense based on the doctrines of res judicata and collateral estoppel is not among those specifically enumerated in Article V of the New York Convention as a defense to confirmation of a foreign arbitral award. However, the Supreme Court has noted the fact that "the doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1991) (internal quotation marks omitted). The court need not resolve the issue of the interplay between these doctrines and the Convention, however, in view of its conclusion below that Coutinho's arguments based on the doctrines of res judicata and collateral estoppel are unavailing. [*26]

n9 In asserting that Marcus was subject to the court's in personam jurisdiction, Coutinho relied on the section of Connecticut's long-arm statute that requires a "cause of action arising . . . out of any contract made in this state or to be performed in this state." Conn. Gen. Stat. § 33-929(f)(1).

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As a general rule, the doctrine of res judicata, or "claim preclusion," provides that when a court of competent jurisdiction has entered final judgment on merits of a cause of action, the parties to that action and their privies are thereby bound not only as to every matter presented to the court but also as to every matter that might have been brought before the court. Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 366 (2d Cir. 1995); Baptiste v. Commissioner of Internal Revenue, 29 F.3d 433, 435-36 (8th Cir. 1994). Under the doctrine of collateral estoppel, or "issue preclusion," the second suit is upon a different cause of action, and the judgment in the prior suit "precludes relitigation of issues actually litigated and[*27] necessary to the outcome of the first action." Parklane Hosiery Co. v. Shore, 439 U.S.

322, 327 n.5, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979). For collateral estoppel to apply, four elements must be present: "(1) the issues of both proceedings must be identical, (2) the relevant issues were actually litigated and decided in the prior proceeding, (3) there must have been 'full and fair opportunity' for the litigation of the issues in the prior proceeding, and (4) the issues were necessary to support a valid and final judgment on the merits." Central Hudson Gas & Elec. Corp., 56 F.3d at 368.

As a preliminary matter, the court notes that only the defense of issue preclusion, as opposed to claim preclusion, is potentially applicable in this case. This is so because the claims being brought before the court by Marcus and Hunan in the present litigation -- petitions for enforcement of an arbitral award -- could not possibly have been brought in the earlier action initiated by Coutinho. At the time Marcus moved to dismiss the suit Coutinho filed in August 1994, there was no arbitral award to be enforced. The court therefore turns to the defense of issue preclusion. [*28]

As to Hunan, Coutinho's collateral estoppel argument should be rejected summarily, because Hunan was not a party to the earlier action nor is it in privity with any party to the earlier action. "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." Parklane Hosiery Co., 439 U.S. at 327 n.7. While there is no doubt that Coutinho's transactions with Marcus and Hunan were materially intertwined, this does not, as a matter of law, place Marcus and Hunan in privity with one another. See, e.g., Alpert's Newspaper Delivery Inc. v. New York Times Co., 876 F.2d 266, 270 (2d Cir. 1989); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 688 n.9 (7th Cir. 1986).

Coutinho's argument also fails with respect to Marcus, the defendant in the earlier litigation in this district, because the doctrine of collateral estoppel applies only to judgments on the merits, and a dismissal for lack of personal jurisdiction is not a judgment on the merits. See Harper Plastics, Inc. v. Amoco Chemicals Corp., 657 F.2d 939, 943 (7th Cir. 1981);[*29] n10 Segal v. American Tele. and Tele. Co., 606 F.2d 842, 844 (9th Cir. 1979); Thaler v. Casella, 960 F. Supp. 691, 697 (S.D.N.Y. 1997); In re Geauga Trenching Corp., 110 B.R. 638, 642 (Bankr. E.D.N.Y. 1990); Fed. R. Civ. P. 41(b). Accordingly, the court's order dismissing Coutinho's prior action for lack of personal jurisdiction over Marcus does not preclude relitigation of the question of whether a valid contract existed between the parties.

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n10 It is correct, as Coutinho points out, that the court in Harper Plastics, Inc. refers to a "more modern view" as to what constitutes a judgment on the merits which "extends to dismissals on other than traditionally substantive grounds." 657 F.2d at 943. However, the first citation following that statement is to Rule 41(b) of the Federal Rules of Civil procedure, which explicitly provides that "unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b) (emphasis added).

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[*30]

Coutinho argues that the court made the substantive finding in the 1994 case that no contract existed before ruling that the court had no jurisdiction over Marcus. Accordingly, in Coutinho's view, that finding is entitled to preclusive effect. Assuming arguendo that a dismissal for lack of personal jurisdiction bars relitigation of substantive issues necessarily decided in making the determination as to jurisdiction, the court nonetheless concludes that there was no prior finding as to the existence of a contract which has preclusive effect.

In particular, Marcus was not given a "full and fair opportunity," in the prior action, to litigate the question of whether a contract was formed. In its motion to dismiss, Marcus argued that, while there was a valid contract between the parties, the contract and its attendant circumstances did not support the assertion of personal jurisdiction in the state of Connecticut. (Mot. to Dismiss (doc. # 12, Docket Number 3:94cv1325).) The court's conclusion that no contract existed between the parties was based exclusively on a "concession" made by Coutinho. (Ruling on Def.'s Mot. to Dismiss at 6-7.) Clearly Marcus had no incentive to[*31] challenge a "concession" which supported its position on the primary issue being litigated that of in personam jurisdiction.

Moreover, the court's finding that there was no contract between the parties was not necessary to support its ruling on jurisdiction. In particular, after finding that the plaintiff's "concession" deprived the court of jurisdiction, the court then found, in the alternative, that "even if there was a contract to be performed, the contract was not to be performed in Connecticut." (Ruling on Def.'s Mot. to Dismiss at 7.)

None of the above-referenced conclusions are altered by the language of the marginal endorsement order denying Marcus' motion for a stay pending arbitration. That order reads as follows:

In light of the Court's finding that no contract existed between the parties [see Ruling on Defendant's Motion to Dismiss], defendant's application to stay this proceeding pending arbitration is DENIED.

(Marginal Endorsement to Application For Stay Proceeding Re: Arbitration (doc. # 13, Docket Number 3:94cv1325).) The "finding" contained in this marginal endorsement is explicitly based on the court's Ruling on Defendant'S Motion to Dismiss. [*32] Therefore, the nonpreclusive nature of the ruling on the motion to dismiss carries over to this order. Moreover, the finding that no contract existed between the parties was not necessary to the disposition of Marcus' application for a stay, as there was no litigation to be stayed once the case had been dismissed. n11

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n11 The date stamps on the court's ruling on the motion to dismiss and the court's endorsement to the application for a stay indicate that the two orders were filed simultaneously, at 4:38 p.m. on July 30, 1996.

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B. Article II Requirement of an "Agreement in Writing"

Coutinho next opposes confirmation of the arbitral award on the ground that the requirement in Article II of the Convention that there be an "agreement in writing" between the parties was not met in this case. In particular, Coutinho argues that there was no arbitration agreement upon which an enforceable award could have been based due to the failure of a condition precedent upon which the validity of the entire contract, [*33] including the arbitration clause, was contingent.

The court construes Coutinho's argument as one that the jurisdictional requirement of Article IV(1)(b) for obtaining recognition and enforcement of an arbitral award, i.e., that the court be furnished with the "agreement in writing" contemplated by Article II, cannot be complied with here because no such agreement ever existed, as opposed to (i) an argument, pursuant to Section 1(a) of Article V, that the agreement was not valid under the law of the country where the award was made, or (ii) an argument that a determination that there was no agreement in writing would be an additional basis for refusing, pursuant to Article V, to recognize and enforce an award. See Yusuf Ahmed Alghahim & Sons, 126 F.3d at 19 (The seven bases set forth in Article V "are the only grounds explicitly provided under the Convention" for refusing to confirm an arbitral award.). Also, the court notes that, to the extent Coutinho argues that the Convention is not applicable at all to the arbitral award at issue here, the Court finds that argument unpersuasive. See supra Part II.A..

Article II(2) provides that "the term 'agreement in[*34] writing' shall include an arbitral clause in a contract . . . signed by the parties . . . ." Here, in each case, both parties signed a "Contract," and that contract contained an arbitral clause. In both instances, Coutinho's signature was followed by a statement indicating that its being bound by the contract was subject to the letter of credit being amended as requested; there was no such provision as to the buyer. Thus, the contract was, in each case, subject to a condition precedent. However, it was a contract nonetheless. This is not a situation where the parties structured a condition precedent to the existence of the contract, see 13 Richard A. Lord, Williston on Contracts, @ 38:7 (4th ed. 2000), notwithstanding Coutinho's arguments that appear to be to the contrary. This fact is evidenced by the second sentence below Coutinho's signature, which refers to "present Contract conditions."

However, even assuming arguendo that the document at issue here is not a "contract" under Article II(2), the language of Article II is nonetheless sufficiently broad to include it, and the language of the Convention "should be interpreted broadly to effectuate its recognition and[*35] enforcement purposes." Bergesen, 710 F.2d at 933. An agreement in writing "shall include" and thus is not limited to an arbitral clause in a contract, and Section 1 provides that the relationships between the parties can be "contractual or not." Convention, art. II(1). Here, there was at a minimum an agreement, which was in writing, that the parties would be contractually bound if the letter of credit was amended as requested. In that agreement, the parties undertook to submit to arbitration all disputes in connection with the contract or the execution thereof.

Moreover, this is not a case where the requested amendments to the letter of credit call into question whether the parties had undertaken to submit any

disagreement to arbitration. The requested amendments to the letter of credit were completely unrelated to the arbitration clause.

C. Article V(2)(b) of the Convention

Finally, Coutinho opposes confirmation of the arbitral award, pursuant to Article V(2)(b) of the Convention, on the ground that enforcement would be contrary to the public policy of the United States. In particular, Coutinho claims that the Commission impermissibly usurped a role[*36] reserved for the courts when it made the determination that the parties had entered into a valid arbitration agreement, notwithstanding the parties' dispute over whether the agreement ever went into effect due to the failure of an express condition precedent.

Thus, Coutinho objects to the Commission's ruling that the arbitration clauses in the purported contracts between the parties were severable from the contracts in which they were embedded and that, therefore, the Commission had jurisdiction to decide whether the underlying contracts for the sale and purchase of steel billets existed. n12 Coutinho asserts that, in deciding that the contract and arbitration clause were severable, the Commission "violated the basic law of the forum in which [Marcus and Hunan are] now seeking enforcement." (Mem. of Law in Opp'n to Pet. to Confirm Arbitration Award (doc. # 10, Docket Number 3:96cv2218) at 27.)

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n12 This threshold determination, of course, allowed the arbitrators to make the further finding that Marcus and Hunan had satisfied the condition precedent of furnishing acceptable letters of credit to Coutinho and that, accordingly, the parties were bound to honor the terms of the sales contract.

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[*37]

The public policy defense under Article V(2)(b) of the Convention is an extremely narrow one, which pertains only when "enforcement would violate the forum state's most basic notions of morality and justice." Parsons & Whittemore Overseas Co., 508 F.2d at 974. As the court has noted:

> The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. Additionally, considerations of reciprocity -- considerations given express recognition in the Convention itself -- counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

Id. at 973-74 (internal citations omitted).

In light of this mandate that Article V(2)(b) should be construed narrowly, it stands to reason that erroneous legal reasoning or misapplication of established legal principles by an arbitral panel should generally[*38] not be held to violate public policy within the meaning of the Convention. As the

district court noted in A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd., 1989 U.S. Dist. LEXIS 11401, No. 88 Civ. 4500 (MJL), 1989 WL 115941 (S.D.N.Y. Sept. 27, 1989),

all laws, be they procedural or substantive, are founded on strong policy considerations. Yet not all laws represent this country's "most basic notions of morality and justice." Were it otherwise, the Convention's public policy exception would eviscerate the very goal of the Convention as a whole -- to encourage the recognition and enforcement of commercial arbitration agreements.

1989 U.S. Dist. LEXIS 11401, *6, 1989 WL 115941, at *2. Accordingly, any legal error by the Commission in ruling on the severability of the arbitration clause in this case should not justify a refusal to recognize the award on public policy grounds.

Moreover, courts in this country disagree over the basic legal rules that the Commission is accused by Coutinho of violating. In particular, courts addressing the scope of the principle that arbitration clauses are severable have taken positions that are not uniform. Compare Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 476 (9th Cir. 1991)[*39] (noting that arbitration clauses must be treated as severable from the documents in which they appear, unless there is clear intent to the contrary; such clauses may thus be enforced even though the rest of the contract is later held invalid by the arbitrator), with Sellux Marine Agencies, Inc. v. Louis Dreyfus Corp., 455 F. Supp. 211, 219 (S.D.N.Y. 1978) (noting that an arbitration clause is not severable when the existence of the contract from which it is to be severed is in dispute).

In addition, while it is fairly well-settled that a court should decide the issue when parties disagree about whether they ever entered into an arbitration agreement, see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995); Abram Landau Real Estate v. Benova, 123 F.3d 69, 72 (2d Cir. 1997), courts appear to have disagreed as to whether this general rule encompasses the question of satisfaction of conditions precedent to an otherwise valid contract containing an arbitration clause. Compare El Hoss Eng'g & Transport Co. v. American Indep. Oil Co., 289 F.2d 346, 348-50 (2d Cir. 1961)[*40] (noting that the court must decide whether conditions precedent to contract containing arbitration clause were complied with before case goes to arbitration), with Schacht v. Beacon Ins. Co., 742 F.2d 386, 391 (7th Cir. 1984) (noting, in dicta, that the condition precedent issue would be for the arbitrator to decide); Rainbow Investments, Inc. v. Super 8 Motels, Inc., 973 F. Supp. 1387, 1389, 1392 (M.D. Ala. 1997) (noting that a claim that "agreement never went into effect due to failure of a condition precedent" did not negate finding that parties had made an agreement to arbitrate).

Accordingly, the court finds unpersuasive Coutinho's argument that because the Commission decided the issue of whether the arbitration clauses in the purported contracts were severable, enforcement of the awards would be contrary to the public policy of this country.

IV. CONCLUSION

For the foregoing reasons, the court concludes that each of Coutinho's objections to enforcement of the Commission's award is unavailing. Accordingly, each of the Petition to Confirm Arbitration Award brought by Marcus (Docket Number 3:96cv2218) and the Petition to Confirm[*41] Arbitration Award

brought by Hunan (Docket Number 3:96cv2219) is hereby GRANTED.

Moreover, because the court has concluded that it does not have subject matter jurisdiction to hear Coutinho's petition to vacate the arbitral award (Docket Number 3:95cv2362), Marcus' motion to dismiss Coutinho's petition (doc. # 5) is hereby GRANTED.

The clerk shall close each case.

It is so ordered.

Dated at Hartford, Connecticut, this 14thday of March 2000.

Alvin W. Thompson

United States District Judge